Y 94/5

99th Congress
2d Session

COMMITTEE PRINT

Ser. No. 9

# VOTING RIGHTS ACT: PROPOSED SECTION 5 REGULATIONS

## REPORT

OF THE

## SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS

OF THE

## COMMITTEE ON THE JUDICIARY
## U.S. HOUSE OF REPRESENTATIVES

NINETY-NINTH CONGRESS

SECOND SESSION

PUBLIC LIBRARY
AUG 13 1986
U. S. GOVT. PUBS.
DEPOSITORY 375

JULY 1986

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1986

57-708 O

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

Y4.J89/1:

## COMMITTEE ON THE JUDICIARY

PETER W. RODINO, JR., New Jersey, *Chairman*

JACK BROOKS, Texas
ROBERT W. KASTENMEIER, Wisconsin
DON EDWARDS, California
JOHN CONYERS, JR., Michigan
JOHN F. SEIBERLING, Ohio
ROMANO L. MAZZOLI, Kentucky
WILLIAM J. HUGHES, New Jersey
MIKE SYNAR, Oklahoma
PATRICIA SCHROEDER, Colorado
DAN GLICKMAN, Kansas
BARNEY FRANK, Massachusetts
GEO. W. CROCKETT, JR., Michigan
CHARLES E. SCHUMER, New York
BRUCE A. MORRISON, Connecticut
EDWARD F. FEIGHAN, Ohio
LAWRENCE J. SMITH, Florida
HOWARD L. BERMAN, California
RICK BOUCHER, Virginia
HARLEY O. STAGGERS, JR., West Virginia
JOHN BRYANT, Texas

HAMILTON FISH, JR., New York
CARLOS J. MOORHEAD, California
HENRY J. HYDE, Illinois
THOMAS N. KINDNESS, Ohio
DAN LUNGREN, California
F. JAMES SENSENBRENNER, JR., Wisconsin
BILL McCOLLUM, Florida
E. CLAY SHAW, JR., Florida
GEORGE W. GEKAS, Pennsylvania
MICHAEL DEWINE, Ohio
WILLIAM E. DANNEMEYER, California
HANK BROWN, Colorado
PATRICK L. SWINDALL, Georgia
HOWARD COBLE, North Carolina

M. ELAINE MIELKE, *General Counsel*
GARNER J. CLINE, *Staff Director*
ALAN F. COFFEY, JR., *Associate Counsel*

---

### SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS

DON EDWARDS, California, *Chairman*

ROBERT W. KASTENMEIER, Wisconsin
JOHN CONYERS, JR., Michigan
PATRICIA SCHROEDER, Colorado
CHARLES E. SCHUMER, New York

F. JAMES SENSENBRENNER, JR., Wisconsin
MICHAEL DEWINE, Ohio
WILLIAM E. DANNEMEYER, California

CATHERINE A. LEROY, *Counsel*
IVY L. DAVIS, *Assistant Counsel*
JAMES X. DEMPSEY, *Assistant Counsel*
STUART J. ISHIMARU, *Assistant Counsel*
PHILIP KIKO, *Associate Counsel*

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
*Washington, DC, February 3, 1986.*

Hon. PETER W. RODINO, Jr.,
*Chairman, House Judiciary Committee,*
*Washington, DC.*

DEAR MR. CHAIRMAN: On January 29, 1986 the Subcommittee on Civil and Constitutional Rights approved the enclosed report on the proposed Section 5 regulations for the Voting Rights Act. The report makes recommendations for the improvement of the proposed regulations. No additional, supplemental or dissenting views were received.

I request that this document be printed for use by the Committee.

With kind regards.

Sincerely,

DON EDWARDS,
*Chairman, Subcommittee on Civil and Constitutional Rights.*



READEX Microfiche best copy available

## PREFACE

On May 6, 1985, the Department of Justice published a proposed revision of procedures for the administration of Section 5 of the Voting Rights Act of 1965.[1] The Department solicited comments on the proposed regulations for a 60 day period ending July 5, 1985.

The Department received well over 100 comments by the July 5 deadline. A number of comments were received after the deadline, and were made a part of the comment file.

The proposed regulations generated an unusually large amount of public debate. Many of the comments received by the Department were from residents of jurisdictions covered by Section 5. These comments were general in nature and indicated that Section 5 has been an effective tool in fighting voting discrimination. These comments urged that the Section 5 regulations remain unchanged. Other, more detailed comments were concerned that standards of review included in the proposed regulations, under which a violation of Section 2 will trigger an objection under Section 5, did not conform with the accepted standards of Section 5 review. Still others were concerned that neither the language of the 1982 amendments to the Voting Rights Act nor its legislative history supported the incorporation of Section 2 standards into Section 5.

The Subcommittee conducted two hearings, on November 13 and 20, 1985, to consider the proposed regulations. Testifying at the November 13 hearing were Dorothy Ridings, President, League of Women Voters of the United States; Cynthia Hill, Director of Election Services and Litigation, League of Women Voters Education Fund; Laughlin McDonald, Director, Southern Regional Office, American Civil Liberties Union Foundation, Atlanta, GA; Katharine I. Butler, Associate Professor of Law, University of South Carolina, Columbia, SC; Judith A. Sanders-Castro, Staff Attorney, Mexican American Legal Defense and Educational Fund, San Antonio, TX; and Dianne Ross, Deputy Director, Voting Rights Litigation Project, Texas Rural Legal Services, San Antonio, TX. On November 20, the Honorable Wm. Bradford Reynolds, Assistant Attorney General for Civil Rights, Department of Justice, and Frank R. Parker, Visiting Fellow, Joint Center for Political Studies, presented testimony to the Subcommittee.

## INTRODUCTION

The right to vote is fundamental in a democratic society, for it is preservative of all other rights. But for too long, many Americans, especially blacks in the south, were denied the right to vote because of their race. In response to this denial, Congress passed a

[1] 50 FR 19122. Section 5 of the Voting Rights Act, 42 USC 1973c. Section 5 Regulations, 28 CFR Part 51.

number of laws, beginning with the 15th Amendment ratified in 1870,[2] in an attempt to provide this fundamental right.

But nearly a century after the ratification of the 15th Amendment, the right to vote still was not available to many black Americans, and was also denied to many other minority Americans. The use of discriminatory practices and procedures, such as poll taxes and literacy tests, clearly demonstrated the need for comprehensive voting rights legislation. The Civil Rights Acts of 1957 [3] and 1960 [4] provided additional ways to secure and protect the right to vote through litigation. But case-by-case litigation proved to be an expensive, cumbersome and limited method to redress this denial. These laws were of limited use in providing the franchise to minority Americans.

In 1965, Congress passed the Voting Rights Act,[5] outlawing the use of discriminatory voting practices and procedures. In order to prevent subterfuge and future discrimination, Section 5 of the Act required jurisdictions with a history of the use of discriminatory practices and procedures, and with a below-average record of voter registration,[6] to obtain either a declaratory judgment in the U.S. District Court for the District of Columbia or approval from the Attorney General before enacting or changing "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." [7] There would be no objection to the voting change if the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." [8] This procedure, commonly known as "preclearance," provided a swift administrative method to prevent potential discrimination. The success of Section 5 has been amply documented.[9]

The Department of Justice first promulgated regulations for the administration of Section 5 in 1971.[10] The Department revised these regulations in 1981.[11] The 1981 regulations are presently in effect. The Department is proposing the new regulations because of the need to "conform the existing Procedures to developments that have occurred since 1981, interpretations of Section 5 contained in judicial decisions, and changes mandated by the 1982 Amendments to the Voting Rights Act." [12]

## EVALUATION OF THE PROPOSED REGULATIONS

The proposed regulations make a number of substantive and procedural changes to the existing regulations. Much of the proposed regulations is not objectionable and will add to a better under-

---

[2] "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." 15th Amendment, Section 1. Declared ratified on March 30, 1870.

[3] P.L. 85-315; 71 Stat. 634.

[4] P.L. 86-449; 74 Stat. 86.

[5] P.L. 89-110, (August 6, 1965), 78 Stat. 241, 42 USC 1973, et. seq.

[6] *See* Section 4(b), 42 U.S.C. 1973b.

[7] 42 USC 1973c.

[8] Id.

[9] *See, e.g.*, McDonald, *The 1982 Extension of Section 5 of the Voting Rights Act of 1965: The Continued Need for Preclearance*, 51 Tenn. L. Rev. 1 (1983).

[10] 36 FR 18186 (September 10, 1971).

[11] 46 FR 870 (January 5, 1981).

[12] 50 FR 19122 (May 6, 1985).

standing of standards and requirements necessary for Section 5 application and enforcement.

Most of the controversial debate centered around Subpart F, "Determinations by the Attorney General," which will be evaluated first. Additional sections of the proposed regulations raise other questions. An evaluation of these sections will follow.

*Subpart F. Determinations by the Attorney General, Sections 51.51–51.59.*—The most controversial part of the proposed regulations is Subpart F, Determinations by the Attorney General. This Subpart greatly expands existing regulations.[13] This new subpart provides that if a proposed voting change violates the Constitution or other federal statutes, then the Attorney General will object to the change.[14] It also sets out standards and procedures to be used in such a situation. This subpart codifies much of existing Department of Justice enforcement practice.[15]

Subpart F was objected to by advocates from all parts of the political spectrum. Some questioned whether the violation of other voting rights protections, specifically Section 2 standards, should be used in a Section 5 review.[16] Civil rights advocates were concerned that standards created by this subpart were not consistent with established standards for Section 5 review.[17] All sides urged the Department to reconsider the proposed regulations.

The basic underlying question is whether a violation of another part of the Voting Rights Act should trigger an objection under Section 5. In litigation following the enactment of the 1982 Voting Rights Act extension, the Department took the position that an objection should follow.[18] But some experts argue that Section 2 standards should not be incorporated into a Section 5 review.[19] They argue that because Section 5 was not amended by the 1982 amendments to the Act, no change was intended to be made to Section 5. Absent express statutory languaage, they argue, it would not be proper to rely solely on legislative history to support the use of such standards. They also point to colloquies between Mr. Edwards of California, the principal manager of the bill in the House, and Messrs. Levitas and Fowler, which support the conclusion that the 1982 Amendments do not change Section 5.[20]

---

[13] Compare existing regulations, Section 51.39 (standards for determination by the Attorney General), 28 CFR at 469, with proposed regulations, Sections 51.51–51.59. Proposed Section 51.51 basically mirrors existing Section 51.39. Proposed Sections 51.52–51.59 have no comparable existing section.

[14] See Section 51.54

[15] *See, e.g.*, Post-trial brief for the U.S. in *County Council of Sumter County, SC* v. *U.S.*, Civil Action No. 82–0912, (D.C.D.C.), p. 26, attached as Appendix A. (Hereafter *Sumter County* post-trial brief.) The proposed regulations do not, however, codify all of the Justice Department's existing enforcement practice. *See, e.g.*, Department of Justice Section 5 objection letters for *Amite County, MS* (June 6, 1983) and *Oktibbeha County, MS* (June 17, 1983), attached as Exhibits 2 and 3 to the prepared statement of Frank R. Parker before the Subcommittee on Civil and Constitutional Rights, November 20, 1985. These two objection letters do not shift the burden of proof away from the jurisdiction or raise the level of proof to clear and convincing evidence, as the proposed regulations do.

[16] *See, e.g.*, Comments of Clarence M. Pendleton, Chairman, U.S. Commission on Civil Rights, commenting in his capacity as a private citizen, comment dated July 5, 1985.

[17] *See, e.g.*, Comment of the Lawyers' Committee for Civil Rights Under Law, by Frank R. Parker, Director, Voting Rights Project, July 2, 1985.

[18] *See Sumter County* post-trial brief, *supra*.

[19] *See, e.g.*, prepared statement of Katharine I. Butler, prepared statement of Timothy G. O'Rourke, before the Subcommittee on Civil and Constitutional Rights, November 13, 1985.

[20] 128 Cong. Rec. H3844–45, June 23, 1982.

The statutory language from Section 2 and Section 5 do not address the question of whether Section 2, or any other section, applies to Section 5 preclearance determinations. In such cases, courts have relied on the legislative history to determine the intent of Congress.[21]

Although Section 5 was not amended and did not receive extensive consideration during the 1982 amendments, there is legislative history relative to the question of whether Section 2 standards should be applied in Section 5 proceedings. And as the United States notes in an earlier case, "each time the issue is addressed the conclusion is that Section 2 is to be applied in Section 5 proceedings." [22]

Three primary examples support this conclusion. The Senate report states, "in light of the amendment to Section 2, it is intended that a Section 5 objection also follow if a new voting procedure itself so discriminates as to violate Section 2." [23] Senator Kennedy, a principal cosponsor, said, "At the same time, as the [Senate] report points out, where there is a section 5 submission which is not retrogressive, it would be objected to only if the new practice itself violated the Constitution or amended section 2." [24] Mr. Sensenbrenner, a principal cosponsor in the House and a member of this Subcommittee, said that "where there is a section 5 submission which is not retrogressive, it would be objected to only if the new practice itself violated the Constitution or amended section 2." [25] The fact that the House manager of the Act, Mr. Edwards of California, concurred with Mr. Sensenbrenner's interpretation of the 1982 amendments further adds to its weight.

Critics of this view point to the Edwards colloquies, noted above,[26] as authority for not supporting the application of Section 2 in Section 5 proceedings. But these colloquies do not address the specific question of whether Section 2 should be applied in Section 5 cases. Rather, they address the general question of whether Section 5 was changed by the 1982 amendments. Since the language of Section 5 was not changed, the Edwards colloquies are best seen as authority for the fact that Section 5 was not changed on its face, and not to the specific question of whether Section 2 standards should be applied in Section 5 cases.

The view that the presence of a Section 2 violation precludes the granting of preclearance under Section 5 is consistent with past Department of Justice enforcement practice.[27] The Department has objected, under Section 5, to violations of Section 2 and Section 4(f), the bilingual election provision. The Department has operated under the assumption that "Congress re-enacted Section 5 in 1982 apparently with a full understanding that preclearance would be denied to those voting changes that run afoul of other nondiscrimination provisions of the Act." [28]

---

[21] See, *Beer* v. *U.S.*, 425 U.S. 130, 139-141 (1976), *McDaniel* v. *Sanchez*, 452 U.S. 130, 146-153 (1981).

[22] *Sumter County* post-trial brief, *supra*, at 29.

[23] S. Rep. 97-417, 97th Cong., 2d Sess., p. 12, n. 31 (1982).

[24] 128 Cong. Rec. S7095, June 16, 1982.

[25] 128 Cong. Rec. H3841, June 23, 1982.

[26] *See* fn 20, *supra*.

[27] *See Sumter County* post-trial brief, *supra*, at 32.

[28] Id at 35.

Further, it is bad public policy to allow violations of one section of a statute to be approved by another. As the Justice Department argued in *Sumter County*, the granting of preclearance is

> viewed as a certification that a change has neither a racially discriminatory purpose or effect. It would, therefore, be inconsistent with the overall purposes of the Voting Rights Act to interpret Section 5 in a manner which would require approval when the facts establish a clear violation of another nondiscrimination provision of the same statute.[29]

To further the purposes of the Voting Rights Act, a violation of another section of the Act should trigger an objection under Section 5.

Thus, the Subcommittee concludes that it is a proper interpretation of the legislative history of the 1982 amendments to use Section 2 standards in the course of making Section 5 determinations.

Having concluded that a violation of another section of the Voting Rights Act should trigger an objection under Section 5, what standards should be used when making such a determination? Should existing Section 5 standards continue to be used in such situations?

Subpart F proposes a number of new standards for Section 5 review: shifting the burden of proof away from the submitting jurisdiction and onto "the party or parties alleging violation of the section, and not on the submitting authority."[30] Once the burden has been shifted, then the standard of proof is raised from the usual preponderance of the evidence standard to one of "clear and convincing evidence."[31]

Neither of these changes have any support in the legislative history of the 1982 Amendments or in relevant caselaw. The relevant legislative history, as outlined above, gives no indication that the standards for Section 5 review have been changed. The burden of proof in Section 5 cases has always been on the jurisdiction,[32] and not on minority voters or others challenging the change. By enacting Section 5, Congress intended to "shift the advantage of time and inertia from the perpetrators of the evil to its victims."[33]

The evidentiary standard under Section 5 has been the usual "preponderance of the evidence" standard.[34] It never has been one of clear and convincing evidence. The clear and convincing evidence standard is normally reserved for a limited range of disfavored claims.[35]

At the November 20 hearing, Assistant Attorney General Wm. Bradford Reynolds explained that:

> If the objection, however, rests on Section 2, which is a different provision of the statute, then you would have the burden on that party that Congress said has to meet its

---

[29] Id.
[30] Proposed Section 51.56(c)(1).
[31] Id.
[32] *City of Rome* v. *U.S.*, 446 U.S. 156 (1980), *reh. den.* 447 U.S. 916 (1980).
[33] *South Carolina* v. *Katzenbach*, 383 U.S. 301, 328 (1966).
[34] *City of Port Arthur* v. *U.S.*, 517 F.Supp. 987 (D.D.C. 1981), *aff'd* 459 U.S. 159 (1982).
[35] *See* C. McCormick, *Handbook of the Law of Evidence*, 679–81 (1954).

> burden under Section 2. . . . It wouldn't be on the submitting jurisdiction.
>
> Section 2, if it is incorporated into Section 5 for analysis, stands on its own terms as Congress has fashioned it, and if you show a violation Section 2 standing on its own terms, the guidelines are proposing that that would be a basis for the Attorney General to take cognizance of that situation, to object under Section 5.
>
> So it is simply incorporating Section 2—the guidelines are suggesting you incorporate Section 2 as it was given to us by Congress. And as given to us by Congress, the burden of proof is on the moving party or the plaintiff.[36]

When asked, Mr. Reynolds was unable to cite supporting case law or legislative history to support this interpretation. As support, he did say that the legislative history may support a reading of not incorporating Section 2 into Section 5.[37]

As detailed above, the Subcommittee concluded that Section 2 should be incorporated into Section 5, and that the legislative history supports such an interpretation. In order to properly administer Section 5, proper standards must be used. Since Section 5 was not amended by the 1982 Amendments, the Subcommittee concludes that it is improper to impose Section 2 standards in making a Section 5 determination, absent supporting legislative history or case law. Section 5 standards are well established,[38] and should be continued in this circumstance.

Proposed Section 51.53 acknowledges the *Beer* v. *U.S.*[39] retrogression test as the standard to show prohibited discriminatory effect and thus a violation of Section 5. The *Beer* retrogression test narrowly interprets the "effects" test of Section 5. The retrogression test operates so if an electoral change will make members of racial or language minority groups worse off than they had been before the change, then the Attorney General will object to the change under Section 5. But if the position of the group has not retrogressed, then there has not been a discriminatory effect under Section 5.

Proposed Section 51.53 goes on to make one exception to the *Beer* retrogression standard:

> Where the retrogression is unavoidable, however, the Attorney General will not object to a retrogressive change that nonetheless fairly reflects minority voting strength as it exists. See *City of Richmond* v. *U.S.*, 422 U.S. 358, 370-371 (1975).

The section is troubling for a number of reasons. First, it does not define "unavoidable retrogression." As witnesses pointed out, retrogression is never unavoidable because the Attorney General can always object to a retrogressive change.[40] The addition of the

---

[36] Hearings before the Subcommittee on Civil and Constitutional Rights, November 20, 1985, Unedited transcript at 17.

[37] Id at 38.

[38] See, *e.g.*, fn 32 and 34, *supra*.

[39] 425 U.S. 130 (1976).

[40] *See, e.g.*, Prepared statement of Laughlin McDonald before the Subcommittee on Civil and Constitutional Rights. November 13, 1985 at 6.

"fairly reflects" proviso attempts to provide such a definition. But this test, from the *City of Richmond* case, was applied by the court in an annexation situation only. It was not applied to situations across the board. When asked, Assistant Attorney General Wm. Bradford Reynolds could not cite another situation in which the *City of Richmond* test was applied. This section should be reworked to reflect the fact that a *City of Richmond* case should be limited to annexation situations only, and that other retrogressive changes, unavoidable or not, will be objected to be the Attorney General.

This section fails to recognize other exceptions to the *Beer* retrogression standard. One witness cogently chronicled these exceptions: [41]

(1) even if a new plan is an improvement, it may still be objectionable if it "nonetheless continue(s) so to discriminate on the basis of race or color as to be unconstitutional." [42]

(2) a legislative plan is an improvement over a prior legislative plan but diminishes black voting strength when compared with an intervening court-ordered plan.[43]

(3) preexisting districts are severely malapportioned and cannot serve as a proper benchmark for measuring retrogression.[44]

(4) racially discriminatory preexisting districts covered by Section 5 were not precleared or were precleared on the basis of improper Section 5 standards.[45]

(5) when changing from multi-member to single-member districts the jurisdiction had the burden under Section 5 to demonstrate "that the proposed change fairly reflects the strength of black voting power as it exists." [46]

The proposed regulations should be redrafted to incorporate all exceptions to the *Beer* retrogression standard, and should indicate that any future exception will be considered incorporated as well.

Proposed Section 51.55, *Relevant Factors*, leads off with the most relevant factor in a Section 5 determination:

> The existence of a reasonable and legitimate justification for a submitted change is generally highly relevant in evaluating that change under Section 5.

The section goes on to list other "generally relevant" factors.

Witnesses were concerned that this section could be interpreted to allow preclearance of discriminatory voting changes that had a "reasonable and legitimate justification," as some reasonable and legitimate justification can be found for just about any voting change. But Assistant Attorney General Reynolds said at the November 20 hearing that a discriminatory voting change can never

---

[41] See prepared statement of Frank R. Parker before the Subcommittee on Civil and Constitutional Rights, November 20, 1985 at 14.

[42] *Beer* v. *U.S.*, 425 U.S. at 142 n. 14.

[43] *Mississippi* v. *U.S.*, 490 F. Supp. 569, 581-82 (D.D.C. 1979) (three-judge court), *aff'd mem.*, 444 U.S. 1050 (1980).

[44] *Wilkes County* v. *U.S.*, 450 F. Supp. 1171, 1178 (D.D.C. 1978) (three-judge court), *aff'd mem.*, 439 U.S. 99 (1981).

[45] *Mississippi* v. *Smith*, 541 F. Supp. 1329 (D.D.C. 1982) (three-judge court), *appeal dism'd* 461 U.S. 912 (1983).

[46] *Mississippi* v. *U.S.*, *supra*, at 581.

be reasonable and legitimate.[47] This section should be revised to reflect this fact.

Proposed Sections 51.56, *Particularized standards for certain types of changes*, 51.57, *Redistrictings*, 51.58, *Changes in electoral systems*, and 51.59, *Annexations*, provide standards for when the Attorney General will object to a voting change. These sections repeatedly use such terms as "significant," [48] "unreasonable," [49] "unnecessarily," [50] and "unfairly." [51] The use of these terms strongly implies that discriminatory voting changes which are insignificant, reasonable, necessary or fair will be precleared by the Attorney General. No standards are given as to what would be significant, unreasonable, unnecessary or unfair.[52]

No part of the 1982 Amendments or relevant case law supports such a view. The Voting Rights Act was intended to eliminate discrimination. No exceptions were made for insignificant, reasonable, necessary or fair discrimination. One wonders how any discriminatory changes could be fair.

The proposed section dealing with Redistrictings, Section 51.57 gives a number of relevant factors for determining whether a basis for objection exists. One of these factors, 51.57(c)(3) requires a showing of:

> the extent to which continuing effects of past discrimination have resulted in lower voter registration and election participation rates for minority group members than for other persons.

Such a showing of a causal nexus was rejected during the 1982 Amendments to the Voting Rights Act. Once a showing is made of "disproportionate educational[,] employment, income level and living conditions arising from past discrimination," and minority political participation is depressed, then no "further causal nexus between their disparate socio-economic status and the depressed level of political participation" need be shown.[53] This factor should be modifed to reflect Congressional intent from the 1982 Amendments.

### EVALUATION OF OTHER SECTIONS OF THE PROPOSED REGULATIONS

*Section 51.13—Examples of Changes.*—This section of the proposed regulations gives a number of examples of proposed voting changes subject to Section 5. Such lists of examples help covered jurisdictions determine whether changes they have made are subject to Section 5 preclearance.

Witnesses at the hearings raised a number of other examples not included on this list. One type of change that the courts have found

---

[47] Hearing before Subcommittee on Civil and Constitutional Rights, November 20, 1985, unedited Transcript at 35.

[48] As in "significant reduction of minority voting strength" Proposed Section 51.57(a)(2).

[49] As in "unreasonably fragments minority voter concentrations," Proposed Section 51.56(c)(2)(i).

[50] As in "unnecessarily fragments minority concentration." Proposed Section 51.57(b)(2).

[51] As in "unfairly . . . reduces minority voting strength." Proposed Section 51.58(b)(2).

[52] For example, what is "significant"? A voting change may shift only 1% of the minority voting population, but may lead to a different result in a close election. Is this "significant"? *See, e.g.*, Prepared statement of Dianne Ross before the Subcommittee on Civil and Constitutional Rights, November 13, 1985, at 7.

[53] Senate Report 97-417, 97th Congress, 2nd Session, p. 29, n. 114 (1982).

to be subject to preclearance is the reallocation of government powers among elected officials voted upon by different constituencies or among elected or appointed officials.[54] Another is when a change imposes substantial economic disincentive upon persons seeking or wishing to seek office.[55]

While the Subcommittee recognizes that this section expressly states that it is not inclusive, in order to best serve the users of the regulations, this section should be as inclusive as possible. It should be reworked to incorporate changes which have been held subject to Section 5 preclearance, especially new changes since the last regulations were promulgated in 1981.

*Section 51.17—Special elections.*—This section requires preclearance of special elections, "to the extent that the jurisdiction makes changes in the practices or procedures to be followed." The question of whether special elections are covered by Section 5 is not addressed in the existing regulations.

The Subcommittee approves of the addition of this proposed section. In past years, the absence of a comparable section in the regulations led to inconsistent application of Section 5. An example of this inconsistency was the Justice Department's suit to require preclearance of the 1985 special election for a vacancy in the 1st Congressional District of Texas,[56] while not requiring preclearance for a 1983 vacancy in the 6th Congressional District of Texas.[57] A Republican won the 1983 race, while a Democrat won the 1985 race.

This section, however, should recognize and incorporate the Supreme Court holding in *NAACP* v. *Hampton County Election Commission.*[58] The Court in *Hampton County* held that the exercise of discretion by local officials constituted a voting standard, practice or procedure, and thus is subject to Section 5 scrutiny. The express purpose of the proposed regulations is to reflect developments since 1981, and clearly *Hampton County* is a major development on the issue of special elections and Section 5.

A revised section should eliminate any ambiguity about what constitutes a change in practice or procedure. Any exercise of discretion by the jurisdiction should be considered a change in practice or procedure. For example, setting the date for a special election may affect whether eligible voters will be able to vote (e.g., setting a date in a jurisdiction with a large student population when the school is in recess).

*Section 51.18—Court ordered changes.*—This section states, in part:

> Changes designed or formulated by a Federal court are not subject to preclearance merely because the court in fashioning a remedy seeks to effectuate legitimate policies of the jurisdiction. When, however, a jurisdiction submits and a Federal court then adopts a proposed change reflecting

---

[54] *McCain* v. *Lybrand*, 104 S.Ct. 1037, 1046, n. 17 (1984), *Harry County* v. *U.S.*, 449 F.Supp. 990 (D.D.C. 1978) (3 judge court), *Hardy* v. *Wallace*, 603 F.Supp. 174 (N.D. Ala. 1985) (3 judge court). See also Prepared statement of Judith A. Sanders-Castro before the Subcommittee on Civil and Constitutional Rights, November 13, 1985, at 5.

[55] *Huffman* v. *Bullock County*, 528 F.Supp. 703 (M.D. Ala. 1981).

[56] *U.S.* v. *Texas*, Civ No. SA-85-CA-2199 (W.D. Tex.)

[57] *Turner* v. *Fainter*, Civ No. A-83-CA-35 (W.D. Tex, Feb 8, 1983).

[58] 105 S.Ct. 1128 (1985).

the policy choices of the jurisdiction officials, the change is subject to the preclearance requirement of Section 5.

These standards are not consistent with the Supreme Court's ruling in *McDaniel V. Sanchez.*[59] *McDaniel* required preclearance of a court-ordered plan "reflecting the policy choices of the elected representatives of the people."[60] As presently worded, this passage would overrule the holding in *McDaniel,* as well as imply that only plans developed solely by the jurisdiction are subject to Section 5 review. Thus, under this section, a plan developed by the court, reflecting a discriminatory policy choice of the jurisdiction, would not be subject to Section 5 preclearance. This section should be revised to cite and incorporate *McDaniel* and to avoid the confusion generated by this passage.

Another problem with proposed Section 51.18 is the exception made for exigent circumstances. A remedial plan must be precleared, "except when the court concludes that exigent circumstances (e.g., impending elections) warrant use of such a plan on an interim basis."

This exception virtually invites jurisdictions developing remedial plans to delay the submission of the plan until it is too late for the Department or the court to preclear the plan, thus creating exigent circumstances and allowing the use of the plan on an interim basis. This exception also effectively shifts the venue of review away from Federal District Court for the District of Columbia, as expressly provided for in Section 5, to the local District Court hearing the case. The regulations should require jurisdictions to submit their plans in a timely fashion, and not allow a pending election to be used as a basis for escaping Section 5 review.

*Section 51.25, Withdrawal of submissions.*—This section allows jurisdictions to withdraw submissions "at any time prior to a final decision by the Attorney General." This provision alters existing Section 51.23, which allows a jurisdiction to withdraw submissions "only if it shows good cause for such withdrawal."

No justification is given for the elimination of the good cause requirement. The Subcommittee believes that this standard should be continued in any new regulations, to avoid bad faith withdrawal by jurisdictions.[61] The existing requirement of good cause has not been shown to encourage non-compliance, and is not so onerous as to put an unfair burden on the jurisdictions.

*Section 51.37—Obtaining information from the submitting authority, and Section 51.40—Failure to complete submissions.*—Section 51.37 allows the Attorney General to request omitted information from a submitting jurisdiction. Section 51.40 allows the Attorney General to object to an incomplete submission.

Proposed Section 51.37 would make optional the current requirement that the Attorney General shall request further necessary information from the jurisdiction.[62] Coupled with proposed Section

---

[59] 452 U.S. 130 (1981).
[60] 452 U.S. 130, 152.
[61] *See, e.g.* Prepared statement of the League of Women Voters of the United States before the Subcommittee on Civil and Constitutional Rights, November 18, 1985, at 11.
[62] 28 CFR § 51.35 (1984).

51.40, an incomplete submission may be precleared by the Attorney General. Because the burden of proof under Section 5 is on the submitting jurisdiction, it should not be rewarded with preclearance when submitting an incomplete submission. These sections should be reworked to make clear that the Attorney General will ask for withheld materials and that incomplete submissions will not be precleared.

*Section 51.62—Bar to termination of coverage (bailout).*—Subsection (b) defines a non-failure to comply with Section 5 for the purpose of bailout under Section 4(a):

> For purposes of Section 4(a), a jurisdiction shall not be deemed to have failed to comply with Section 5 by reason of an objection interposed and subsequently withdrawn (see § 51.48) by the Attorney General.

This section is objectionable for a number of reasons. First, the purpose of these regulations is to aid in the application of Section 5 of the Act. Bailout is a standard considered in Section 4, and only makes reference to standards in Section 5. Regulations covering bailout standards under Section 4 do not serve to advance the application of Section 5 of the Act.

Second, this standard is wrong. The 1982 Amendments did change the bailout standards under the Act, but not in the manner stated by this section. This proposed section creates a new bailout standard for objections subsequently withdrawn by the Attorney General. The statutory language of the 1982 Amendments, the legislative history, or case law do not support the expansion of the bailout standard. In the relevant portion of Section 4, subsection (a)(1)(E), withdrawn objections are not considered.

Because this section is wrong on the law, and does not further the express purpose of the revised regulations, it should be withdrawn in its entirety.

## Conclusion

The principal reason for the success of the Voting Rights Act has been Section 5 requiring preclearance of voting changes. In order to get the most out of Section 5, effective regulations and vigorous enforcement are required. Regulations must reflect accurate congressional intent and relevant case law, as well as administrative efficiency.

Testimony presented to the Subcommittee revealed troubling problems with the proposed regulations. While the Subcommittee recognizes the desire of the Department of Justice to issue updated regulations in timely manner, the Subcommittee places greater emphasis on the development of regulations which accurately reflect congressional intent and case law.

If adopted, the proposed regulations would undermine the effective enforcement of the voting Rights Act. The proposed regulations abandon proven methods of success and adopt new methods not sanctioned by the 1982 Amendments or by case law.

Any future regulations proposed by the Department should seriously consider the issues raised by the numerous commenters, by the witnesses at Subcommittee hearings and by this Subcommittee

report. It is further recommended that the Department seek public comment for any revised regulations it may issue, both in proposed and final form. The intensity of debate generated by the first set of proposed regulations amply demonstrates that these regulations are of great public interest, and that any nonministerial changes to the existing regulations should be open to full and complete public discussion. The protection of the fundamental right to vote deserves no less.

# APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

COUNTY COUNCIL OF SUMTER COUNTY, SOUTH CAROLINA, ET AL., PLAINTIFFS

*v.*

UNITED STATES OF AMERICA, ET AL., DEFENDANTS,

*and*

LARRY BLANDING, ET AL., DEFENDANTS-INTERVENORS

Civil Action No. 82-0912

POST-TRIAL BRIEF FOR THE UNITED STATES OF AMERICA

STANLEY S. HARRIS,
*United States Attorney.*
WM. BRADFORD REYNOLDS,
*Assistant Attorney General.*

GERALD W. JONES,
PAUL F. HANCOCK,
J. GERALD HEBERT,
ROBERT N. KWAN,
THOMAS G. SNOW,
*Attorneys.*
Voting Section,
Civil Rights Division,
Department of Justice,
10th and Constitution Ave., NW,
Washington, DC 20530.
(202) 724-6292.

[Excerpt]

## IV. APPLICATION OF SECTION 2 OF THE VOTING RIGHTS ACT TO THIS SECTION 5 PROCEEDING

In granting the motion of defendants-intervenors Blanding, et al., to intervene in this case, this Court made the following observation:

> The Section 2 issue cannot be ignored at least upon first impression. . . . We may or may not be required to decide the Section 2 issue, but we will be better able to deal with it if we have evidence than if the argument were before us only in the abstract.

*County Council of Sumter County* v. *United States*, 555 F. Supp. at 699.[1] In our view, the plaintiffs have failed to meet their burden of proof concerning racial "purpose" and "effect" as defined in Section 5. Accordingly, although we believe the evidence clearly establishes a Section 2 violation, it may be unnecessary to reach that issue on this record. However, in the event that the Court deems it necessary to address the Section 2 issue, we describe below our basis for concluding that Section 2 is applicable in Section 5 proceedings and we summarize the evidence which demonstrates that the at-large election system at issue violates Section 2.

### A. SECTION 2 IS APPLICABLE IN SECTION 5 PROCEEDINGS

The statutory language of Sections 2[2] and 5 itself does not say one way or the other whether Section 2 applies to Section 5 preclearance determinations. Section 5 merely states that no voting change may be enforced unless it has been proven that it "does not have the purpose and will not have the effect denying or abridging the right to vote on account of race or color, or [membership in a language minority group]." 42 U.S.C. 1973c. Consequently, the issue of whether Section 2 should apply to a Section 5 proceeding "is not a case in which the language of the controlling statute unambiguously answers the question presented." *McDaniel* v. *Sanchez*, 452 U.S. 130, 146 (1981). It is customary in such instances to resort to the legislative history of the statute to determine the intent of Congress, and the Supreme Court has done precisely this in interpreting Section 5. See *Beer* v. *United States*, *supra*, 425 U.S. at 139–141; *McDaniel* v. *Sanchez*, *supra*, 452 U.S. at 146–153.

In *Beer* v. *United States*, decided eleven years after passage of the Voting Rights Act, the Supreme Court was faced with the issue of how to measure discriminatory effect in a Section 5 case. Because the language of Section 5 did not answer this question, the Supreme Court in *Beer* said, "A determination of when a [voting change] has 'the effect of denying or abridging the right to vote on account of race or color,' must depend, therefore, upon the intent of Congress in enacting the Voting Rights Act and specifically § 5." 425 U.S. at 139–140. To ascertain congressional intent, the Court in *Beer* turned to an examination of the legislative history of the Voting Rights Act, such as committee reports and legislators' remarks.[3]

---

[1] At the time of this Court's decision on intervention, the issue of applying Section 2 in a Section 5 declaratory judgment lawsuit was pending before the Supreme Court in *City of Lockhart* v. *United States*, 51 U.S.L.W. 4189 (U.S. February 23, 1983). On February 23, 1983, the Supreme Court decided that case, declining to review the Section 2 issue in the first instance. 51 U.S.L.W. at 4191 n. 9.

[2] The opening paragraph of plaintiffs' post-trial brief (p. 46) on the Section 2 issue makes an erroneous statement of fact. Plaintiffs claim that "[o]n its face, Section 2 relates to private actions brought by individual or class plaintiffs to challenge election practices regardless of whether they are covered by Section 5." Of course, "on its face," Section 2 makes no mention of private actions. In fact, Section 12 of the Voting Rights Act provides that the Attorney General has the authority to enforce the provisions of the Act (including Section 2). In extending the Voting Rights Act in 1982, however, Congress made it clear that there is a private right of action under Section 2. See S. Rept. No. 97-417, 97th Cong., 2d Sess. 30 (1982).

[3] In establishing the retrogression test for measuring "effect," the *Beer* Court relied primarily upon the House committee report of the 1975 extension of the Act. 425 U.S. at 141, citing H.R. Rep. No. 94-196, 94th Cong., 1st Sess. 60 (1975).

Repeatedly, the Supreme Court has resorted to such legislative materials to determine congressional intent. See, *e.g.*, *City of Rome* v. *United States*, *supra* (no individual bailout for subjurisdictions subject to Section 5 preclearance requirements by statewide coverage); *United States* v. *Sheffield Board of Commissioners*, 435 U.S. 110, 129–35 (1978) (subjurisdictions are subject to preclearance provisions by statewide coverage); *Allen* v. *State Board of Elections*, 393 U.S. 544, 563–71 (1969) (preclearance required by "any state enactment which altered the election law in a covered State in even a minor way").

The legislative history of the 1982 re-enactment of the Voting Rights Act is the appropriate history to examine to determine whether Congress intended that Section 2 be applied in Section 5 proceedings.[4] While that issue did not receive extensive consideration in the legislative proceedings, each time the issue is addressed the conclusion is that Section 2 is to be applied in Section 5 proceedings. The Senate Report accompanying the 1982 extension of the Act states: "In light of the amendment to Section 2, it is intended that a Section 5 objection also follow if a new voting procedure itself so discriminates as to violate Section 2." S. Rep. No. 97-417, 97th Cong., 2d Sess. 12 n. 31 (1982).[5] There are statements on the floor of both the Senate and the House that likewise say that Section 2 applies to Section 5. On the Senate floor, Senator Kennedy, one of the sponsors of the 1982 extension of the Act, said: "At the same time, as the [Senate] report points out, where there is a Section 5 submission which is not retrogressive, it would be objected to only if the new practice itself violated the Constitution or amended Section 2." 128 Cong. Rec. S7095 (daily ed. June 16, 1982).[6] On the House floor, Representative Sensenbrenner, "one of the architects of the results test in the House" (S. Rep. No. 97-417, *supra*, at 138), said that "when there is a Section 5 submission that is not retrogressive, it would be objected to only if the new practice itself violated the Constitution or amended Section 2." 128 Cong. Rec. H3841 (daily ed. June 23, 1982).[7] Immediately after these remarks were made, Representative Edwards, one of the House sponsors of the final bill and the chairman of the House subcommittee

---

[4] Prior to the 1982 amendment to Section 2, the Section was considered to be co-extensive with the Fifteenth Amendment. See *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980); S. Rep. No. 97-417, *supra*, at 15–27. The *Beer* Court held that Section 5 is violated by a voting procedure which "itself so discriminates on the basis of race or color as to violate the Constitution." 425 U.S. at 141.

[5] Plaintiffs devote a great deal of their Section 2 discussion to their contention that the explicit reference to the applicability of Section 2 to Section 5 cases is a footnote in the Senate Report and does not appear in the text of that document. Plaintiffs cite to no legal authority for the proposition that footnotes in legislative documents have no instructive value in determining the intent of Congress.

[6] As noted by plaintiffs in their post-trial brief (pp. 43–45), Senator Kennedy's remarks on the floor of the Senate occurred near the end of the debate and just prior to the reenactment of the Voting Rights Act. Plaintiffs fail to state why the timing of those remarks would diminish their significance as evidence of legislative intent. In any event, while the remarks of one Senator may "not [be] entitled to the same weight as [] carefully considered committee reports, the senate debate preceding the passage of the [1982 extension of the Voting Rights] Act confirms what the [Senate Committee Report] demonstrates." *United States* v. *International Union, United Automobile Workers*, 352 U.S. 567, 585–586 (1957).

[7] As a member of the House subcommittee responsible for the legislation and one of the "architects" of the Section 2 "results" test, Representative Sensenbrenner was "among the most active [legislators] in securing passage of" the 1982 extension of the Voting Rights Act; and thus his views are entitled to weight in determining legislative intent. *Portland Cement Ass'n* v. *Ruckelshaus*, 486 F.2d 375, 381–382 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974).

having jurisdiction over the extension of the Act, stated his concurrence with Representative Sensenbrenner's interpretation of the bill. (*Ibid.*).

These are the only references to the issue at bar that we have found in the legislative proceedings. However, each statement clearly indicates an intention that Section 2 be applied in Section 5 proceedings and no contrary views have been discovered.[8] But see 128 Cong. Rec. H3844–H3845 (daily ed. June 23, 1982) (remarks of Representatives Levitas, Fowler and Edwards).[9]

We believe that these statements are entitled to substantial weight in any effort to discern legislative intent. The Senate Report, for example, was commended to the full Senate and thus is entitled to greater weight than any other of the legislative history. *American Jewish Congress* v. *Kreps*, 574 F.2d 624, 629 n. 36 (D.C. Cir. 1978).[10] The remarks of Senator Kennedy and Representatives Sensenbrenner and Edwards are also instructive. As sponsors of the legislation, the remarks of Senator Kennedy and Representative Edwards "deserv[e] to be accorded substantial weight . . ." *NLRB* v. *Fruit Packers*, 377 U.S. 58, 66 (1964); *FEA* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976). While the statements of individual legislators are not controlling, the comments of those who sponsored the legislation "are an authoritative guide to the statute's construction." *New Haven Board of Education* v. *Bell*, 50 U.S.L.W. 4501, 4504 (U.S. May 17, 1982).

Thus, when the legislative history to the Voting Rights Act is examined in the same manner as was done in *Beer*, *Sheffield* and *Rome*, the inescapable conclusion is that Congress intended that Section 5 preclearance be denied if it is determined that a voting procedure violates Section 2.[11]

The position that the presence of a Section 2 violation precludes the granting of a Section 5 declaratory judgment is consistent with the past enforcement of the Voting Rights Act. The Attorney General has interpreted the intent of Congress as requiring a denial of Section 5 preclearance to voting changes which violate other provisions of the Act designed to eliminate discrimination in voting. For

---

[8] The fact that this issue was not discussed extensively in Congress does not mean that the legislative references should be ignored. As mentioned previously, the *Beer* retrogression standard was discerned from relatively minor references in the legislative history. In *Sheffield*, *supra*, the Supreme Court in attempting to discern the intention of Congress, stated: "The specific narrow question was not extensively discussed at the time of original enactment, but there is little, if anything, in the original legislative history that in any way supports the crippling construction of the district court." 393 U.S. at 130.

[9] In our view, the specific references to the application of Section 2 to the Section 5 standard in the Senate Report should be accorded greater weight in ascertaining legislative intent than the more general references to Section 5 relied upon by plaintiffs. (Plaintiffs' Post-Trial Brief at 46–47). In any event, to the extent that there is conflict, if any, "reports by the legislative committees responsible for formulating the legislation must take precedence over statements in the legislative debates on the floors of the houses of Congress." *American Airlines, Inc.* v. *CAB*, 365 F.2d 939, 948–949 (D.C. Cir. 1966), citing *inter alia United States* v. *International Union, United Automobile Workers*, 352 U.S. 567, 585 (1950).

[10] The report of the standing committee in each house of the legislature which investigated the desirability of the statute under consideration is a much used source for determining the intent of the legislature, especially when it sets forth the committee's grounds for recommending passage of the proposed bill and, more important, its understanding of the nature and effect of the measure. See *Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 464 (1892); *Zuber* v. *Allen*, 396 U.S. 168, 186 (1969).

[11] It is significant also that Congress did not merely amend the Voting Rights Act in 1982, but rather re-enacted the Act. Thus, although the language of Section 5 was not altered, it is proper to refer to the legislative history of the 1982 re-enactment of Section 5 to determine how Congress intended the Section to be applied.

example, the Attorney General consistently has denied Section 5 preclearance to voting changes which violate Section 4(f)(4) of the Voting Rights Act. Section 4(f)(4) requires certain covered jurisdictions to implement bilingual voting procedures. The Procedures for the Administration of Section 5 state specifically:

> Consideration by the Attorney General of a jurisdiction's compliance with the requirements of Section 4(f)(4) occurs in the review pursuant to Section 5 of the Act of changes with respect to voting. . . .

28 C.F.R. 55.2(e).[12] Thus, Section 5 review of changes involving the effect of bilingual election programs is not limited to "retrogression" or "constitutionality"; rather the Section 5 determination also involves a review of whether the change complies with Section 4(f)(4).[13]

This interpretation of Section 5 by the Attorney General was reported to the Congress during its consideration of extending the Voting Rights Act in 1982. For example, in testifying before the Subcommittee on the Constitution of the Senate Judiciary Committee on March 1, 1982, the Assistant Attorney for the Civil Rights Division stated:

> Several enforcement actions have been filed under Section 5 to obtain compliance with the bilingual-election requirements of Section 4(f).

*Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the Senate Committee on the Judiciary*, 97th Cong., 2d Sess. 1659 (1983) (Statement of Wm. Bradford Reynolds, Assistant Attorney General, Civil Rights Division); see also, *id.* at 1720 (Attachment A-2 to Statement of Wm. Bradford Reynolds) ("Section 5 has been used in several instances to obtain compliance with the bilingual-election requirements of Section 4(f)"). While these remarks were limited to the application of Section 4(f) language nondiscrimination provisions through Section 5, there would appear to be no sound basis for differential treatment of a voting change which violates another provision of the Act designed to prohibit racial discrimination in voting, such as Section 2.

Of course, administrative construction of the Act by the Attorney General is particularly persuasive, in light of the key role that the Attorney General has played "in drafting the statute and explaining its operation to Congress." *United States* v. *Sheffield Board of Commissioners, supra*, 435 U.S. at 131 (footnote omitted). In relying on "the Attorney General's longstanding construction of § 5" (*id.* at 132), Congress re-enacted Section 5 in 1982 apparently with a full understanding that preclearance would be denied to those voting changes that run afoul of other nondiscrimination provisions of the Act. "When a Congress that re-enacts a statute voices its approval

---

[12] The House and Senate reports accompanying the 1975 extension of the Voting Rights Act do not state specifically that Section 5 submissions should be reviewed in this manner. Rather the reports state that jurisdictions must demonstrate that the voting change does not discriminate against language minority groups. S. Rep. No. 94-295, 94th Cong., 1st Sess. 35, n. 39 (1975); H.R. Rep. No. 94-196, 94th Cong., 1st Sess. 27, n. 43 (1975).

[13] *See Apache County High School District* v. *United States*, Civ. No. 77-1815 (D.D.C., June 12, 1980) "Section 4(f)(4), while not dispositive in a Section 5 litigation, provides guidance regarding what constitutes discriminatory behavior against language minorities." Slip op. 15.).

of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation, and [the Supreme] Court is bound thereby." (*Id.* at 134; citations omitted).

Also as a matter of public policy, we believe that preclearance should be denied for changes that violate Section 2. Section 5 preclearance by the Attorney General or this Court is viewed as a certification that a change has neither a racially discriminatory purpose or effect. It would, therefore, be inconsistent with the overall purposes of the Voting Rights Act to interpret Section 5 in a manner which would require approval when the facts establish a clear violation of another nondiscrimination provision of the same statute. In such circumstances, denial of preclearance on Section 2 grounds would be more consistent with the purposes of the Act than granting preclearance to voting procedures that are racially discriminatory within the meaning of Section 2.[14]

For the above reasons we believe that the Section 2 standard is applicable in Section 5 proceedings. However, we do not believe that the Section 2 application imposes an additional burden of proof on Section 5 plaintiffs. Rather, in our view, if a violation of Section 2 is alleged as a basis for denying Section 5 preclearance, it is the responsibility of the charging party to go forward to prove discriminatory "results" in the first instance. In this litigation that burden falls on the United States and the intervening defendants; the burden shifts to the plaintiffs only after a prima facie case has been made. If the evidence presented in this manner supports an affirmative finding by the Court of a Section 2 violation, preclearance under Section 5 should be denied.

In light of these procedural requirements, we believe that the Section 2 issue need be addressed only if the Court determines that plaintiffs have satisfied their burden of proof under Section 5, *i.e.*, if they have demonstrated that the at-large system is not "retrogressive" and was enacted and has been maintained without a racially discriminatory purpose. If that burden has not been satisfied there is no need to consider the affirmative findings required by Section 2.

### B. THE RECORD SUPPORTS AN AFFIRMATIVE FINDING THAT THE AT-LARGE ELECTION STRUCTURE AT ISSUE VIOLATES SECTION 2

Section 2 of the Voting Rights Act, as amended by Congress in 1982, provides:

> SEC. 2. (a) No voting qualification or prerequisite to voting or standard, practice or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).

---

[14] Plaintiffs have argued that if "preclearance is denied to an ameliorative change, the effect is to resurrect the existing, more repressive law." (Plaintiffs' Post-Trial Brief at 47 n. 13). However, as mentioned previously, the *Beer* test itself prohibits Section 5 preclearance of an ameliorative voting procedure which violates the Constitution and thus the same argument can be applied to that decision. The answer is that the Court envisioned that the constitutional violation would be remedied; and Congress had the same thought concerning violations of the amended Section 2.

(b) A violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State of political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

The amendment to Section 2 was designed to make clear that proof of discriminatory intent is not required to establish a violation of Section 2. S. Rep. No. 94-417, *supra*, at 27.[15] "Section 2 protects the right of minority voters to be free from election practices, procedures or methods, that deny them the same opportunity to participate in the political process as other citizens enjoy. If as a result of the challenged practice or structure [black citizens] do not have an equal opportunity to participate in the political processes and elect candidates of their choice, there is a violation of [Section 2]." *Id.* at 28. Congress has described a number of factors applicable in assessing a possible Section 2 violation. The factors described in the Senate Report include the following: (1) history of discrimination in voting; (2) radical bloc voting; (3) majority vote and full-slate requirements that enhance the discriminatory result; (4) depressed socio-economic conditions in the minority community; (5) injection of race into campaigns and election contests; and (6) the consistent defeat of minority candidates. Other factors that sometimes may be relevant include a showing of governmental unresponsiveness, and a tenuous state policy in favor of the challenged voting procedure.[16]

The evidence of record, when viewed in light of these factors, supports an affirmative finding that black citizens in Sumter County do not have an equal opportunity to participate in the political processes and elect candidates of their choice. In fact, affirmative factual findings can be made on this record concerning each of the exemplary factors described by Congress: historical discrimination in voting (Findings ¶s 8 to 14); racial bloc voting (Findings ¶s 106 to 109); majority vote and full-slate requirements (Finding ¶ 110); a depressed socio-economic status among blacks (Findings ¶s 10, 12 and 113); injection of racial appeals into campaigns (Findings ¶s 82 to 99); and the consistent defeat of minority candidates (Find-

[15] Of course, the presence of racial purpose in either the adoption or maintenance of the voting procedure at issue would also constitute a violation of Section 2. See S. Rep. No. 97-417, *supra*, at 27 and n. 108. Consequently, a finding that Sumter County either adopted or is maintaining the at-large electoral system for racially discriminatory purposes would establish a Section 2 violation.

[16] These factors were derived from the decision of the Supreme Court in *White* v. *Regester*, 412 U.S. 755 (1973). The factors listed are designed to be exemplary, not exhaustive. The ultimate decision concerning a Section 2 violation "requires the Court's overall judgment, based on a totality of circumstances and guided by those relevant factors in the particular case, of whether the voting strength of minority voters is . . . 'minimized or canceled out.'" S. Rep. No. 97-417, *supra*, at 28-29 and n. 118.

ings ¶s 106 to 110). In addition, the record confirms the County's unresponsiveness to the black community (Findings ¶s 116 to 122); and there has been a showing that, while the state policy is not strong, it leans more toward district-type elections than at-large (Findings ¶s 28 and 111). The totality of the factual circumstances presented on this record demonstrates that the at-large election system violates Section 2 of the Voting Rights Act; that violation requires that Section 5 preclearance be denied.

## V. Conclusion

Since plaintiffs have failed to demonstrate that the at-large election structure "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color," the request for a Section 5 declaratory judgment must be denied. Should the Court find it appropriate to address the issue of whether Section 2 of the Voting Rights Act applies, that question should be answered in the affirmative. When applied to the facts of this case a violation of Section 2 has been shown and, thus, Section 5 preclearance also must be denied on that basis.

Respectfully submitted.

Stanley S. Harris,
*United States Attorney.*
Wm. Bradford Reynolds,
*Assistant Attorney General.*

Gerald W. Jones,
Paul F. Hancock,
J. Gerald Hebert,
Robert N. Kwan,
Thomas G. Snow,
*Attorneys,*
Voting Section,
Civil Rights, Division,
Department of Justice,
10th and Constitution Ave., NW,
Washington, D.C. 20530.
(202) 724-6292

○